

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0017-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
HUMBERTO GAMA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041297

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED;
RELIEF GRANTED IN PART AND REMANDED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

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By Harold L. Higgins, Jr.

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, petitioner Humberto Gama was convicted of possession of a deadly weapon by a prohibited possessor and sentenced to a mitigated, seven-year prison

term. He appealed, and this court affirmed Gama's convictions and sentences. *State v. Gama*, No. 2 CA-CR 2005-0393 (memorandum decision filed Dec. 19, 2006). Thereafter, Gama sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., based on claims of ineffective assistance of trial counsel and a significant change in the law. The trial court denied relief without an evidentiary hearing, and this petition for review followed.

¶2 We will not disturb the trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). In order to establish a claim of ineffective assistance of counsel, entitling the defendant to relief, he must establish counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). With respect to the prejudice element of this test, the defendant must show that, but for counsel's deficient acts or omissions, the outcome of the case would have been different. *State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). A defendant raises a colorable claim that warrants an evidentiary hearing if he has presented "a material issue of fact or law." Ariz. R. Crim. P. 32.6(c); *see also* Ariz. R. Crim. P. 32.8(a). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 On appeal, Gama argued the trial court erred in denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., after the state presented its case. He asserted that, in its case-in-chief, the state had failed to present any evidence that Gama was a prohibited possessor. We rejected that challenge on the ground that Gama had

subsequently testified and admitted he previously had been convicted of two felonies, thereby admitting he was a prohibited possessor. Thus, any defect there may have been in the state's presentation of evidence was cured by Gama's testimony and waived.

¶4 Gama contends, as he did below, that trial counsel performed insufficiently in asserting a "generic" Rule 20 motion and thereby failing to articulate that the state had presented no evidence that Gama was a prohibited possessor. He also contends that counsel failed to inform him adequately of the consequences of testifying, which resulted in the waiver of any claim of error regarding the state's failure to present sufficient evidence in its case-in-chief. In an affidavit attached to his petition for post-conviction relief, he avows that counsel did explain he would be required to admit his prior felony convictions if he testified but failed to explain the legal significance of that admission.

¶5 Gama has failed to establish that, had counsel argued more specifically and more strenuously in making the Rule 20 motion, it would have been granted. By denying post-conviction relief, the trial court made it clear it would not have ruled differently, regardless of how counsel argued the motion. But, Gama has raised a colorable claim that counsel was ineffective in advising him whether to testify in light of the state's failure to present sufficient evidence in its case-in-chief and the possibility he could secure appellate relief on that basis.

¶6 In his affidavit, Gama states he knew he would have to admit his prior convictions if he testified. But, he asserts defense counsel did not explain to him "that the prosecutor had failed to present any evidence" about his convictions and thus had failed to

prove that he was a prohibited possessor. He avowed, “Had I been informed of this, and the possibility that the failure of the prosecutor to prove these matters during the state’s case would or could result in a dismissal, I would not have testified.” He added,

I was absolutely unaware of the issues regarding Rule 20 when I chose to testify, and was not advised that by testifying I would waive any issue regarding Rule 20 and the failure of the state to present evidence regarding my status as a prohibited possessor. Had I known this, I would definitely have chosen not to testify.

¶7 Gama has raised a question of fact about whether defense counsel advised him of the significance of testifying in light of the state’s failure to present evidence that he was a prohibited possessor. If counsel did not advise him adequately and performed deficiently, Gama has raised a colorable claim for relief. His appeal was unsuccessful because he testified and, as we found, cured the deficiency in the state’s case-in-chief. Additionally, notwithstanding the trial court’s denial of the Rule 20 motion, the outcome at trial arguably would have been different without his testimony because the state did not establish in its case-in-chief that Gama was a convicted felon. Thus, the trial court abused its discretion by denying relief summarily on this claim of ineffective assistance of counsel.

¶8 Gama also contends the trial court abused its discretion in denying relief on his claim that our supreme court’s decision in *State v. Gant*, 216 Ariz.1, 162 P.3d 640 (2007), decided while his appeal was still pending, and recently affirmed by the United States Supreme Court in *Arizona v. Gant*, ___ U.S. ___, No. 07-542, 2009 WL 1045962 (U.S. April 21, 2009), constituted a significant change in the law. He asserts that application of *Gant* would have changed the trial court’s ruling on his motion to suppress the gun police found

in the car he had been driving. We disagree. Officers saw the holster of the gun in plain view from outside the car after Gama and his passengers had been removed from it, giving them probable cause to search the vehicle. It was not discovered as a result of the type of search addressed in *Gant*; thus, the holding in *Gant* could not have affected the outcome of Gama's motion to suppress.

¶9 We grant Gama's petition for review. Because we reject Gama's claim that *Gant* is a significant change in the law entitling him to relief under Rule 32.1(g), we need not address his related claim of ineffective assistance of counsel. The trial court did not abuse its discretion by denying Gama relief on this claim. But, this matter is remanded for an evidentiary hearing on the claim of ineffective assistance of counsel based on Gama's decision to testify.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge